

**STATE OF MICHIGAN
IN THE SUPREME COURT**

**PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant**

v

**DWAYNE EDMUND WILSON
Defendant-Appellee.**

No. 154039

**L.C. No. 2009-002637-FC
COA No. 324856**

**BRIEF BY PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN
AS AMICUS CURIAE IN SUPPORT OF PEOPLE OF THE STATE OF MICHIGAN**

**MARK REENE
President
Prosecuting Attorneys
Association of Michigan**

**KYM L. WORTHY
Prosecuting Attorney
County of Wayne**

**JASON W. WILLIAMS
Chief, Research, Training, and Appeals**

**TIMOTHY A. BAUGHMAN (P 24381)
Special Assistant Prosecuting Attorney
11TH Floor
Detroit, Michigan 48226
Phone: (313) 224-5792**

Table of Contents

	Page
Index of Authorities	-ii-
Statement of the Question	-1-
Statement of Facts	-1-
Argument	
I.	
When the words of a statute are unambiguous, the judicial inquiry is complete. The felony-firearm statute enhances the sentence upon a “second conviction” and also upon a “third or subsequent conviction.” The unambiguous text directs sentencing courts to count each separate felony conviction, including the sentencing offense, not the number of criminal incidents resulting in felony convictions, nor only those convictions based on conduct occurring after a previous conviction.	-2-
Introduction	-2-
Discussion	-3-
A. The task of construction is to determine the objectified intent of the legislature; that is, that which a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris	-3-
B. The statutory text contains no requirement that as a predicate to multiple-offense enhancement the subsequent felony must be committed after conviction for a prior offense or that the felonies must occur in separate transactions	-4-
C. Stare decisis is at its weakest when a prior decision has rewritten a statutory or constitutional text, and is no bar to overruling here	-12-
Relief	-16-

Index of Authorities

Cases	Page
Federal Cases	
Connecticut National Bank v. Germain, 503 U.S. 249, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992)	3
Johnson v. Transportation Agency, Santa Clara County, Cal., 480 U.S. 616, 107 S. Ct. 1442, 94 L. Ed. 2d 615 (1987)	11
Nebraska v. Parker, 136 S. Ct. 1072, 194 L. Ed. 2d 152 (2016)	3
United States v. Cureton, 739 F.3d 1032 (CA 7, 2014)	14
United States v. Luskin, 926 F.2d 372 (CA 4, 1991)	14
United States v. Paladino, 401 F.3d 471, 478–479 (CA 7, 2005)	7
United States v. Rentz, 777 F.3d 1105 (CA 10, 2015)	14
State Cases	
Donajkowski v. Alpena Power, 460 Mich. 243 (1999)	11
Martin v. Beldean, 469 Mich. 541 (2004)	3
Nawrocki v. Macomb County Road Com'n, 463 Mich. 143 (2000)	13
Paige v. Sterling Hts, 476 Mich. 495 (2006)	10
People v. Borchard-Ruhland, 460 Mich. 278 (1999)	4

People v Gardner, 482 Mich. 41 (2008)	2, 7, 8, 9, 10, 11, 13, 14
People v. Morton, 423 Mich. 650, 656 (1985)	14
People v Preuss, 436 Mich. 714 (1990)	2, 7, 8, 10, 14
People v. Sawyer, 94 Mich. App. 393 (1979)	5
People v. Sawyer, 410 Mich. 531 (1981)	passim
People v Stewart, 441 Mich. 89 (1992)	2, 7, 8, 10, 11, 13, 14
People v. Stoudemire, 429 Mich. 262 (1987)	9, 10, 14
People v. Wilson, No. 324856, 2016 WL. 2731096 (2016)	11
Pohutski v. City of Allen Park, 465 Mich. 675 (2002)	14
Robinson v. City of Detroit, 462 Mich. 439 (2000)	13
Statutes and Constitutional Provisions	
Mich. Const. 1963, art. III, § 2	12
MCL 750.227b	2, 4, 12
MCL 769.11	10
18 USC § 924(c).	6, 14

Other Sources

Frank Easterbrook, Alternatives to Originalism?, 19 Harv. J. L. & Pub. Pol'y 479, 486 (1995)	13
Felix Frankfurter, Some Reflections on the Reading of Statutes, 47 Colum. L. Rev. 427, 538 (1947)	4
Antonin Scalia, A Matter of Interpretation	4
Symposium, Discussion: The Role of the Legislative and Executive Branches in Interpreting the Constitution, 73 Cornell L. Rev. 386, 399 (1988)	13

Statement of the Question

I.

When the words of a statute are unambiguous, the judicial inquiry is complete. The felony-firearm statute enhances the sentence upon a “second conviction” and again upon a “third or subsequent conviction.” Does the unambiguous text direct sentencing courts to count each separate felony-firearm conviction, including the sentencing offense, not the number of criminal incidents resulting in felony convictions, nor only those of convictions based on conduct occurring after a previous conviction?

Amicus answers: “YES

Statement of Facts

Amicus joins the statement of facts supplied by the People.

Argument

I.

When the words of a statute are unambiguous, the judicial inquiry is complete. The statute enhances the sentence upon a “second conviction” and again upon a “third or subsequent conviction.” The unambiguous text directs sentencing courts to count each separate felony conviction, including the sentencing offense, not the number of criminal incidents resulting in felony convictions, nor only those of convictions based on conduct occurring after a previous conviction.

Introduction

This court has directed that the parties file supplemental briefs addressing:

- whether MCL 750.227b(1) of the felony-firearm statute requires two prior convictions under this subsection to have arisen from separate criminal incidents in order for a third conviction under the subsection to trigger the 10-year imprisonment penalty; and, if not
- whether this Court should overrule *People v Stewart*, 441 Mich 89 (1992), which, in holding that the two prior convictions must have arisen from separate criminal incidents, relied upon *People v Preuss*, 436 Mich 714 (1990), the reasoning of which was overruled by *People v Gardner*, 482 Mich 41 (2008).

Amicus answers that:

- MCL 750.227b(1) does not require that to trigger the sentence enhancement provisions of the statute the second offense have been committed after a conviction on a prior offense, so that *People v. Sawyer*, 410 Mich. 531 (1981) was wrongly decided, nor does the statute require that multiple prior convictions to trigger the enhancement for a third offense arise from separate criminal incidents, as held in *People v. Stewart*, 441 Mich. 89 (1992); further,
- because *Sawyer* and *Stewart* are fundamentally at odds with the statutory text, and because their reasoning has been overruled by *Gardner*, these cases should be overruled.

Discussion

A. **The task of construction is to determine the objectified intent of the legislature; that is, that which a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris**

Both the United States Supreme Court and this Court have made plain that the starting point of construction of a statute is the text itself, and, where that text is not ambiguous, the text is also the *end* of the court's task. The United States Supreme Court has said, for example, that "As with any other question of statutory interpretation, we begin with the text of the [statute] . . . ('The task of resolving the dispute over the meaning of [a statutory text] begins where all such inquiries must begin: with the language of the statute itself')." ¹ Indeed, "We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there. . . . When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.'" ² And this Court has said that "We first examine the language of the statute and if it 'is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written.'" ³ Also, "Where the language of the statute is unambiguous, the plain meaning reflects the Legislature's intent and this Court applies the statute as written. Judicial construction under such circumstances is not permitted. . . . Only where the statutory language is ambiguous may a court properly go beyond the words of the statute to

¹ *Nebraska v. Parker*, 136 S. Ct. 1072, 1079, 194 L. Ed. 2d 152 (2016) (second brackets in the original).

² *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253–254, 112 S. Ct. 1146, 1149, 117 L. Ed. 2d 391 (1992).

³ *Martin v. Beldean*, 469 Mich. 541, 546 (2004).

determine legislative intent.”⁴ What is sought by the reviewing court, then, is “a sort of ‘objectified’ intent—the intent that a reasonable person would gather from the text of the law, placed alongside the remainder of the corpus juris. As Bishop’s old treatise nicely put it, elaborating upon the usual formulation: ‘[T]he primary object of all rules for interpreting statutes is to ascertain the legislative intent; *or exactly, the meaning which the subject is authorized to understand the legislature intended.*’”⁵

B. The statutory text contains no requirement that as a predicate to multiple-offense enhancement the subsequent felony must be committed after conviction for a prior offense

And so, the text:

Sec. 227b. (1) A person who carries or has in his or her possession a firearm when he or she commits or attempts to commit a felony, except a violation of section 223, 227, 227a, or 230,1 is guilty of a felony and shall be punished by imprisonment for 2 years. *Upon a second conviction under this subsection, the person shall be punished by imprisonment for 5 years. Upon a third or subsequent conviction under this subsection, the person shall be punished by imprisonment for 10 years.*

The statutory construction train first went off the textual track with *People v. Sawyer*⁶ some 35 years ago. The case was decided in an unfortunate manner, permitted at that time by an administrative order of this Court. Under Administrative Order 1977-4 a defendant, after affirmance of his or her conviction by the Court of Appeals, could simply send a letter requesting that the Court consider the

⁴ *People v. Borchard-Ruhland*, 460 Mich. 278, 284 (1999).

⁵ Antonin Scalia, *A Matter of Interpretation*, p. 17 (emphasis in the original). And see Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COLUM. L. REV. 427, 538 (1947)(quoting Justice Holmes as saying, with regard to legislative intent, “I don’t care what their intention was. I only want to know what the words mean”).

⁶ *People v. Sawyer*, 410 Mich. 531 (1981).

decision of the Court of Appeals, as well as the trial court record, to determine whether leave to appeal or other relief should be granted.⁷ Service of the letter on the prosecuting attorney was not required by the administrative order, and the Court's review of the record was not limited to issues raised in the Court of Appeals. Issues of first impression could be decided in this fashion, even by a divided Court. *Sawyer* is such a case. The issue was one of first impression, the issue was not raised in the Court of Appeals, the case was decided by the Court on a letter request and thus without participation by the prosecuting attorney, and the Court was divided 4-3 on the resolution of the issue.⁸

Sawyer committed two *separate* robberies armed with a firearm, and was charged separately in each case with a count of felony-firearm. He pled to both counts in each case in a single plea proceeding. He had no previous conviction for felony-firearm.⁹ The trial judge sentenced him to

⁷ "It is . . . ordered, effective immediately, that indigent incarcerated defendants in criminal cases may submit to this Court a letter requesting that a Court of Appeals decision, the Court of Appeals record and the trial court record be considered by this Court to determine whether leave or other relief deemed appropriate by this Court should be granted. . . . The Court will consider the Court of Appeals decisions and the records of the Court of Appeals and of the trial court to determine, on such record, whether in its discretion leave to appeal or other relief should be afforded to the defendant." The administrative order included a two-sentence form for the letter. See 400 Mich. lxvii-lxviii.

⁸ "Pursuant to Administrative Order 1977-4, 400 Mich. lxvii (1977), defendant has requested that this Court review his convictions." *People v. Sawyer*, 410 Mich. at 533. Defendant's letter was "treated as an application for leave to appeal and, pursuant to GCR 1963, 853.2(4), in lieu of granting leave to appeal, we remand the case to the Recorder's Court of Detroit for resentencing in a manner consistent with this opinion. The judgment of the Court of Appeals is thus modified." *People v. Sawyer*, 410 Mich. at 536. The sole issue in the Court of Appeals was "Did the trial court lack authority to make the two felony-firearm sentences consecutive to one another?" *People v. Sawyer*, 94 Mich. App. 393, 394 (1979).

⁹ *People v. Sawyer*, 410 Mich. at 533.

two years on the felony-firearm conviction where the offense occurred first in time, and to five years on the second conviction. The trial judge also made the felony-firearm convictions consecutive to each other. The only issue in the Court of Appeals, specified in its grant of leave to appeal, was whether the trial court erred in running the two felony-firearm sentences consecutive to one another, which the Court of Appeals upheld. This Court on the letter request quickly reversed that holding as inconsistent with the statutory language,¹⁰ and turned to the enhancement of the second conviction, an issue of first impression not considered in the Court of Appeals.

Rather than looking to the meaning of the text, the Court speculated as to the legislative purpose. The words involved, said the Court, were “upon a second conviction under this section,” a five-year sentence then being mandated. But the majority thought it “by no means clear that the Legislature intended the result found in this case.” The majority observed that among the purposes served by increased punished for repeat offenders is to “provide more severe punishment for a person who declines to change his or her ways following an opportunity to reform,” a purpose not served where there has not been a prior conviction. The majority thus concluded that “the Legislature intended that a five-year term of imprisonment for a second conviction should only be imposed where the second offense is subsequent to the first conviction,” and so held.¹¹ Of course,

¹⁰ “A careful reading of subdivision (2) reveals that the Legislature has only directed that the sentence for felony-firearm be served prior to and consecutively with any term of imprisonment imposed for the felony.” *People v. Sawyer*, 410 Mich. at 535.

¹¹ *People v. Sawyer*, 410 Mich. at 535–536. The majority also found its position consistent with the rule of lenity that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Id.* But the majority had only hypothesized a plurality of possible legislative purposes, and fixed on that which supported its decision. It had not found the statute itself ambiguous. And whatever might be said about how to count multiple felony-firearm convictions arising from *one* transaction, the rule in *Sawyer* that multiple felony-firearm convictions arising from *separate* transactions count as only one if one is not *committed* after the

another possible legislative purpose might be to enhance the punishment of those who commit multiple crimes with guns, whether separated by convictions, or part of different transactions, or not. But the first question should have been whether the text itself is ambiguous, not whether particular legislative purposes might be divined.

Chief Justice Coleman, joined by Justice Fitzgerald dissented, saying that “It is beyond the concept of ‘lenity’ to hold that two felonies committed separately, each with the use of a gun, should be treated as one under the ‘felony firearm act’ because the plea bargaining for both took place at one hearing.”¹² And in a separate dissent that was precise and to the point, Justice T.G. Kavanagh said that “I am sympathetic to the effort of my colleagues to read sense into this statute by giving it the construction they propose, but *I feel constrained to enforce it as the Legislature wrote it.*”¹³ This aptly states the point; the text of the statute does not support a construction that “upon a second conviction” means “upon a second conviction where the second offense is committed after the first conviction, and where the offenses are part of separate transactions.” The overruling of the

conviction of the other is plainly wrong. See *United States v. Paladino*, 401 F.3d 471, 478–479 (CA 7, 2005) (robberies on separate days counting as separate convictions under 18 USC § 924(c)).

¹² *People v. Sawyer*, 410 Mich. at 537. It appears that Chief Justice Coleman thought that under the majority opinion had there been separate plea proceedings or separate trials, then the enhanced sentence for the second conviction would have been appropriate, but that is not what the majority held; an enhanced sentence would not obtain given the majority holding that “a five-year term of imprisonment for a second conviction should only be imposed where the second offense is subsequent to the first conviction.”

¹³ *Id.* (emphasis supplied).

reasoning of *People v. Preuss*,¹⁴ relied upon in *People v. Stewart*,¹⁵ by this Court in *People v. Gardner*,¹⁶ also overrules the reasoning of *Sawyer* as well as *Stewart*, a point to which amicus will return.

*People v. Stewart*¹⁷ is also a “counting” case, where the sentence was enhanced because defendant had a third conviction. The defendant had pled guilty to a felony-firearm count, and received an enhanced sentence of 10 years as a third offender. His two prior convictions for felony-firearm arose from separate episodes, but he was not convicted of the first before committing the second. Given the holding in *Sawyer* that a sentence as a second felony-firearm offender may “only be imposed where the second offense is subsequent to the first conviction,” the Court of Appeals reasoned that if therefore Stewart’s second felony-firearm conviction could not have been counted as a second felony-firearm conviction so as to enhance the sentence to five years because it was not committed after conviction for the first offense, then those two convictions counted as only one, and defendant’s third felony-firearm conviction thus made him a second felony-firearm offender rather than a third. The court found its result compelled by *Sawyer*,¹⁸ and its logic appears impeccable. But this Court disagreed, considering the Court of Appeals holding an expansion of *Sawyer*, rather than a logical consequence of its reasoning: “the Court of Appeals has expanded [the *Sawyer*] holding into a rule that one may not be convicted of felony-firearm (third offense) unless the third

¹⁴ *People v. Preuss*, 436 Mich 714 (1990).

¹⁵ *People v Stewart*, 441 Mich 89 (1992).

¹⁶ *People v Gardner*, 482 Mich 41 (2008).

¹⁷ *People v. Stewart*, 441 Mich. 89 (1992).

¹⁸ *Id.*, at 91.

offense is committed after the second conviction *and* the second offense is committed after the first conviction.”¹⁹ Looking to its decisions regarding the habitual-offender statute, this Court found this “expansion” inappropriate.

In *People v. Stoudemire*²⁰ the Court had held that multiple prior convictions constituted only one conviction for habitual offender purposes when they arose out of a single criminal transaction, and further that in order for a conviction to count as a prior conviction, each conviction had to be for an offense committed after conviction and sentence for a prior offense. But then, this Court said in *Stewart*, in *Preuss*, where the issue was whether two prior convictions must be counted as only one when the second offense precedes the first conviction, the Court held that the statute does *not* require that the prior convictions occur in any particular sequence. The Court said that its holding that enhancement as a second felony-firearm offender “should only be imposed where the second offense is subsequent to the first conviction,” meant, where further convictions are had, “that a defendant may not be convicted as a repeat offender unless the prior conviction(s) precede the offense for which the defendant faces enhanced punishment. There is no requirement that all prior offenses be neatly separated by intervening convictions.”²¹ Stewart was thus in the decidedly odd position of being eligible for punishment as a third offender though he had never been eligible for punishment as a second offender, and his 10-year sentence was upheld. But the Court in *Preuss* had affirmed the holding of *Stoudemire* that “each of those . . . predicate felonies arise from separate criminal incidents, ” and the Court in *Stewart* held the same—to be counted separately the prior convictions

¹⁹ *Id.*, at 94 (emphasis in the original).

²⁰ *People v. Stoudemire*, 429 Mich. 262 (1987).

²¹ *People v. Stewart*, 441 Mich. at 94–95.

must have, as Stewart’s had, “arisen from separate criminal incidents.”²² It was this holding of *Stoudemire*, relied upon by the *Stewart* Court, that multiple felonies that arise from the same criminal incident or transaction count as a single felony under the habitual offender laws that this Court overruled in *Gardner*.

The statutory text at issue in *Gardner* was MCL 769.11, which read, in pertinent part:

If a person has been convicted of any combination of 2 or more felonies or attempts to commit felonies, whether the convictions occurred in this state or would have been for felonies or attempts to commit felonies in this state if obtained in this state, and that person commits a subsequent felony within this state, the person shall be punished upon conviction of the subsequent felony and sentencing under section 13 of this chapter as follows. . . . (emphasis added).

Observing that “when statutory language is unambiguous, judicial construction is not required or permitted,”²³ this Court examined the text, finding that it “clearly contemplates the *number* of times a person has been ‘convicted’ of ‘felonies or attempts to commit felonies,’” and that “[n]othing in the statutory text suggests that the felony convictions must have arisen from separate incidents.”²⁴ *Stoudemire* and *Preuss* were criticized—and overruled²⁵—because though they “essentially

²² *People v. Stewart*, 441 Mich. at 95. The Court said in *Preuss* that “Although we conclude that the legislative purpose behind the fourth-offender statute does not require that we *read into the statute* a requirement that a defendant’s first, second, and third offenses be separated by intervening convictions or sentences, we believe there *is sufficient indicia of legislative intent to support the narrow holding* in *Stoudemire* that a defendant’s prior offenses must arise from separate incidents.” *People v. Preuss*, 436 Mich. at 737–738 (emphasis supplied).

²³ *People v. Gardner*, 482 Mich. at 50.

²⁴ *Id.*, at 51.

²⁵ “We conclude that the holdings of *Stoudemire* and *Preuss* directly contradict the plain text of the statutes. Therefore, we overrule these cases. The unambiguous statutory language directs courts to *count each separate felony conviction that preceded the sentencing offense, not the number of criminal incidents resulting in felony convictions*” (emphasis supplied). *People v.*

acknowledged the clear import of the language,” they “explicitly ignored the text,” turning to other materials to attempt to capture the intent of the legislature.²⁶ Because the terms of the statute were not ambiguous, the Court had erred in turning to other sources to read terms into its text that the statute did not contain.²⁷ The approach taken in *Stoudemire* and *Preuss*, said the Court, exemplifies “the problems inherent in preferring judicial interpretation of legislative history to a plain reading of the unambiguous text.”²⁸ If a current legislature has a different purpose in mind for the statutory scheme than expressed in the text by the enacting legislature, then “[t]he Legislature is fully capable of amending statutory language if it sees fit to do so.” But “[w]hen the Legislature's language is clear [the Court is] bound to follow its plain meaning.”²⁹

The Court of Appeals in the present case recognized the implications of the *Gardner* decision for *Stewart*, saying that “[a]lthough the rationale for the holding in *Stewart* has arguably been called into question by *Gardner*,” it was “bound to follow *Stewart* unless and until it is overruled by our Supreme Court. ‘[O]nly [our Supreme] Court has the authority to overrule one of its prior decisions.

Gardner, 482 Mich. at 44 (emphasis supplied).

²⁶ *People v. Gardner*, 482 Mich. at 50-51.

²⁷ *People v. Gardner*, 482 Mich. at 54-55.

²⁸ *People v. Gardner*, 482 Mich. at 57-58. The Court also rejected any reliance on “legislative acquiescence. As Justice Scalia has said, the supposed doctrine “is, in fact, “a canard” in that it ignores “rudimentary principles of political science to draw any conclusions regarding ‘the intent of the legislature’ from the *failure* to enact legislation.” *Johnson v. Transportation Agency, Santa Clara County, Cal.*, 480 U.S. 616, 107 S. Ct. 1442, 1472-1472, 94 L.Ed. 2d 615 (1987) (Scalia, J., dissenting). And this Court has said that “If it has not been clear in our previous decisions, we wish to make it clear now: ‘legislative acquiescence’ is a highly disfavored doctrine of statutory construction; sound principles of statutory construction require that Michigan courts determine the Legislature's intent from its *words*, not from its silence.” *Donajkowski v. Alpena Power*, 460 Mich. 243, 261 (1999) (emphasis in the original).

²⁹ *People v. Gardner*, 482 Mich. at 59-60.

Until [our Supreme] Court does so, all lower courts and tribunals are bound by that prior decision and must follow it even if they believe that it was wrongly decided or has become obsolete.”³⁰ Because, then, defendant’s two prior felony-firearm convictions arose from the same incident, under *Stewart* they counted only as one conviction for purposes of sentence enhancement under MCL 750.227b(1).

The Court of Appeals was correct that *Gardner* “calls into question” the rationale and holding of *Stewart*, and also that of *Sawyer*, and also correct that it is for this Court rather than that one to declare *Stewart* (and *Sawyer*) obsolete, and to overrule them. It is as clear that the felony-firearm statute, in referencing “a second conviction under this subsection” and “a third or subsequent conviction under this subsection,” requires only the counting of convictions preceding the sentencing, not the counting of criminal episodes (*Stewart*), or the counting only of convictions had after a previous conviction (*Sawyer*), as it is that the habitual statute means, as *Gardner* put it, that “[t]he unambiguous statutory language directs courts to count each separate felony conviction that preceded the sentencing offense, not the number of criminal incidents resulting in felony convictions.” The task is precisely the same with the felony-firearm statute under its unambiguous language. *Stewart* and *Sawyer* should be overruled.

C. Stare decisis is at its weakest when a prior decision has rewritten a statutory or constitutional text, and is no bar to overruling here

When a court has previously construed a statute, but misidentified that which the legislature enacted, it has created a new statute, one other than that enacted by the constitutionally designated

³⁰ *People v. Wilson*, No. 324856, 2016 WL 2731096, at 7 (2016), citing *Paige v. Sterling Hts*, 476 Mich. 495, 524 (2006).

process, and has exercised power in derogation of the separation of powers provision.³¹ To effectuate public justice, and to be faithful to the judicial oath, it is important that it is the will of the lawgiver and not the judicial will that is enforced. The entire notion of enforcement of judicial constructions of statutes necessarily presupposes that there are right answers to questions of construction of these texts. Judge Easterbrook has stated that “judicial review came from a theory of meaning that supposed the possibility of right answers,”³² for if there are instead multiple right or permissible answers, no choice by any branch of government—including the judiciary—from within the field of permissible right answers can bind anyone else, and without a theory under which everyone must follow one answer, the theory of judicial review expounded by Chief Justice Marshall collapses.³³

Justice Markman’s point for the court in *Nawrocki v. Macomb County Road Com’n*³⁴ that a reversal of precedent is most strongly justified when adherence to that precedent would perpetuate a plainly incorrect interpretation of a statutory provision is well taken. When a statutory provision is judicially distorted the bedrock principle of American constitutionalism is compromised; that is, that the lawmaking power is given to the sovereign people and delegated to their political representatives when statutes are enacted, and this judicial distortion amounts to usurpation.³⁵ Where

³¹ MICH. CONST. 1963 art. III, § 2.

³² Frank Easterbrook, *Alternatives to Originalism?*, 19 HARV. J. L. & PUB. POL’Y 479, 486 (1995).

³³ See also Symposium, *Discussion: The Role of the Legislative and Executive Branches in Interpreting the Constitution*, 73 CORNELL L. REV. 386, 399 (1988).

³⁴ *Nawrocki v. Macomb County Road Com’n*, 463 Mich. 143, 180-181 (2000).

³⁵ *Robinson v. City of Detroit*, 462 Mich. 439, 467 (2000).

a statute is involved, it is the text of the statute to which a citizen first looks for guidance, so that, where the words are clear, citizens should expect that reliance on those words is justified, and will be given force by the courts. A court that distorts a statutory or constitutional provision itself disrupts the reliance interests of the citizenry.³⁶

It was for precisely these reasons that this Court overruled *Preuss* and *Stoudemire*, and the logic of those overrulings applies with equal force here.³⁷ This Court should overrule both *Stewart* and *Sawyer* in light of the unambiguous statutory text.³⁸

³⁶ *Pohutski v. City of Allen Park*, 465 Mich. 675, 694-695 (2002).

³⁷ “[T]o the extent that these cases implicate reliance interests, such interests weigh in favor of overruling them. Michigan citizens and prosecutors should be able to read the clear words of the statutes and ‘expect . . . that they will be carried out by all in society, including the courts.’ . . . In fact, should a court confound those legitimate citizen expectations by misreading or misconstruing a statute, it is that court itself that has disrupted the reliance interest. When that happens, a subsequent court, rather than holding to the distorted reading because of the doctrine of stare decisis, should overrule the earlier court's misconstruction.” *People v. Gardner*, 482 Mich. at 62.

³⁸ Amicus would note that a unit-of-prosecution question might appear to lurk in the statutory text where multiple felonies are committed in a single episode or transaction, resulting in multiple felony-firearm convictions—should the prosecution charge the felony-firearm counts that way, rather than including the predicate felonies all in one felony-firearm count—all of which should, as amicus has argued, count as convictions for enhancement purposes under the statute. Federally, 18 USC § 924(c) provides that “any person who, during and in relation to any crime of violence or drug trafficking crime ... uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime ... be sentenced to a term of imprisonment of not less than 5 years.” In the case of a second or subsequent conviction, the sentence is not less than 25 years, and the sentences are consecutive to any other term of imprisonment imposed. A number of federal circuits have held that the unit of prosecution is the use, carry, or possession, not the predicate felony. See e.g. *United States v. Rentz*, 777 F.3d 1105, 1115 (CA 10, 2015) (“each charge requires an independent use, carry, or possession”). See similarly, for example, *United States v. Cureton*, 739 F.3d 1032 (CA 7, 2014). But these cases concern the *simultaneous* commission of multiple felonies with one use of a gun, as in *Rentz*, where the defendant fired a gun once, killing one person and injuring another with the one shot. So the concern in these cases seems to be multiple violations of the statute by one act, and it is not at all clear that they would not permit multiple convictions—and therefore

sentence enhancement—for multiple acts within the same transaction or episode. See *United States v. Luskin*, 926 F2d 372, 376 (CA 4, 1991) (“there is no ‘episode’ test under section 924(c)”).

This case does not involve one act constituting the simultaneous commission of multiple violations of the statute, and, in any event, this Court determined in *People v. Morton*, 423 Mich. 650, 656 (1985) that the unit of prosecution in felony-firearm cases is the predicate felony or felonies: “the Legislature intended, with only a few narrow exceptions, that every felony committed by a person possessing a firearm result in a felony-firearm conviction. Where, as here, the defendant is convicted of separate assaults, we perceive no reason why he may not also be convicted of separate counts of felony-firearm” (these assaults occurred in a single episode or transaction). Amicus submits that if the Court is of the view that *Morton* should be reviewed as to the unit of prosecution in felony-firearm prosecutions with possible multiple counts charged from a single episode or transaction, it should direct further briefing on the point. As it stands, the unit of prosecution is the predicate felony, multiple felony firearm counts and convictions are appropriate out of a single transaction, and *Sawyer* and *Stewart* wrongfully limit the counting of convictions for purposes of the enhancement provisions of the statute.

Relief

Wherefore, amicus requests that this Court reverse the decision of the Court of Appeals regarding the felony-firearm sentences, and overrule both *People v. Sawyer* and *People v. Stewart*.

Respectfully submitted,

MARK REENE
President
Prosecuting Attorneys
Association of Michigan

KYM L. WORTHY
Prosecuting Attorney
County of Wayne

JASON W. WILLIAMS
Chief, Research, Training, and Appeals

/S/
TIMOTHY A. BAUGHMAN
Special Assistant Prosecuting Attorney
11TH Floor
Detroit, Michigan 48226